APPENDIX D

Supreme Court, U. S.
FILED
FEB 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1181

**Department of Human Resources
(formerly State Department of Public Welfare)
of the State of Texas,**

Petitioner

v.

**Joseph A. Califano, Jr.,
Secretary of Health, Education and Welfare,
and
Michael Blumenthal,
Secretary of the Treasury,**

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John L. Hill
Attorney General of Texas

David M. Kendall
First Assistant Attorney General
of Texas

Frank C. Cooksey
(Acting as Special Assistant
Attorney General)
Swift and Swift, P.C.
1444 American Bank Tower
Austin, Texas 78701

Attorneys for the Petitioner

APPENDIX D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

MEMORANDUM

DATE: **Dec 21 1972**

To: SRS Regional Commissioners

From: Associate Administrator for Field Operations

Subject: Guidelines Regarding Retroactive and Current Claims for Social Service Expenditures

The attached memorandum has been signed by the Administrator and is on its way to you through normal channels. This memorandum is intended to expedite its transmittal to you and to provide some guidance as to its use.

Since the intent of the memorandum is to provide you and interested State people with a better understanding of the SRS policy, it should be shared with State people freely and discussed with them in detail. We would hope that this will provide a common ground for later meetings with individual States on the allowability of State claims. On the basis of such discussion and your own review, we would very much appreciate receiving your comment and that of the States.

In addition, if you consider it desirable, we will provide the opportunity for further discussion at an anticipated special meeting of

Regional Commissioners to be held on or around January 16, 1973. Further information on this special meeting will be sent to you soon.

/s/
William J. Page, Jr.

Attachment

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE

MEMORANDUM

Date: DEC 20 1972

To: SRS Regional Commissioners

From: Administrator
Social and Rehabilitation Service

Subject: Interpretation of Federal Regulations in Determining the Allowability of State Claims for Federal Financial Participation in Expenditures for Social Services

In response to inquiries from Regional Offices concerning interpretation of existing Federal Regulations regarding retroactive and current claims for social service expenditures the following guidelines are provided. It is important that these guidelines be consistently applied not only in the consideration of retroactive claims but also in the financial review and audit of State expenditures for periods in which the currently existing Federal Regulations and guides are and have been in effect.

Issue #1

When, if ever, are subsistence and medical care costs allowable as essential components of a comprehensive service program of an institution or residential facility?

Response

Federal Regulations (45 CFR 220.61(d)(1)(i) and 222.88(a)(1)) authorize Federal Financial Participation in expenditures for subsistence and medical care when they are provided as essential components of a comprehensive service program of a facility and their costs are not separately identifiable. These regulations give specific examples of such cases (i.e. rehabilitation center, day care facility, maternity home (AFDC) and neighborhood service center (adult)).

The test for separate identifiability of costs is whether or not an accountant or an auditor can separately identify the costs, having conducted a financial review of the accounts and the cost allocation methods. Implicitly, therefore, since costs can always be separately identified, the question of separate identifiability is not a useful concept. There is obvious intent, under these regulations, to allow subsistence and medical care costs under certain circumstances. Subsistence or other maintenance assistance items, either regular or special, and any costs of medical or remedial care or services are not allowable except:

a. When such items are provided as essential components of a comprehensive program of a service facility and the services are provided as part of an individual service plan; and

b. Where the service facility is one of the following types: maternity home for

unwed mothers; home for emotionally disturbed children (which is not a mental institution); emergency shelter and care facility for abandoned, abused, neglected, homeless, or exploited children; vocational rehabilitation center; residential treatment center (non-hospital) or halfway house for alcoholics or drug addicts; halfway house for persons requiring transitional services to the community from mental or penal institutions, or who require the services of a halfway house as part of a plan to preclude such institutionalization; and

c. When such items are provided within the following time limits for each stay of an individual at such a service facility:

- maternity home for unwed mothers - as needed
- home for emotionally disturbed children (which is not a mental institution) - 6 months
- emergency shelter and care facility for abandoned, abused, neglected, homeless, or exploited children - 14 days
- vocational rehabilitation center - as specified in the individual's vocational rehabilitation plan
- residential treatment center (non-hospital) or halfway house for alcoholics - 30 days - for drug addicts - 90 days

- Other halfway houses - 6 months; and

d. When the service facilities are not a part of a full-time residential mental or penal institution (where the facility is being administered by the same organization that administers a mental or penal institution, complete separation of facilities is required).

To the extent that the Regional Commissioner has specifically approved longer time limits than indicated above for a specific facility in a State prior to issuance of this memorandum such approval shall be honored, but in no case shall such approval apply to fiscal quarters beginning after issuance of this memorandum.

Issue #2

What is a single State agency (particularly with respect to umbrella agencies)?

Response

The single State agency is that agency so designated by the State in its State plan as approved by the Regional Commissioner, SRS. Therefore, the organizational components of a so-called umbrella agency, which is designated and approved as the single State agency are not required to comply with 45 CFR Parts 226, 220.61(c)(2) and 222.87(b) in their dealings with each other and in the provision of services. The umbrella

agency must, however, established procedures to meet all other requirements of Federal regulations. These procedures may take the form of agreements.

Issue #3

What are the criteria under which we determine whether services may be and are provided on a group basis?

Response

Services provided on a group basis can only be provided to persons who are members of groups designated in the State plan as an eligible group under 45 CFR 220.52(a)(3)(iv) or 45 CFR 222.55(a)(2)(iii). The services must be specified in the State plan and be available to all members of the group that request them. The services may be provided by the agency staff members or contracted for on a group basis. If the agency purchases or arranges for the service on an individual basis, or pays for each individual served, the service is not a group service and each recipient would have to qualify individually. Any service, including day care, may be provided on a group basis if the above criteria are met.

Issue #4

What are the criteria under which we determine that a plan provision is in operation?

1. Eligibility for services must be determined at, or prior to, the time of service delivery except in cases of emergency. Specifically regarding

retroactive claims, sampling techniques or any other method of reconstruction used to determine eligibility on a retrospective basis can not provide an allowable alternative to determining eligibility at, or prior to, the time of service delivery.

2. An individual service plan for each recipient of service provided on an individual basis must be developed and maintained on a current basis.

3. There must be a record that services were provided or arranged for pursuant to the individual service plan for services provided on an individual basis and conversely, a means of determining that the services provided were prescribed by the service plan.

4. An established and adequate system of accounting and costing must be in effect along with the maintenance of supporting fiscal records.

OFM in conjunction with regional financial staff will provide additional guidance as to the criteria for adequate system of accounting.

Regarding the determination of when the plan went into operation, if there are isolated breakdowns or exceptions in the implementation of the four items above, these may not preclude a finding that the plan was in operation. In uncertain cases, consult the Central Office.

Regardless of the time permitted for the development of a service plan under 45 CFR 220.16(b), in order for a State Plan to be in operation, services are to be provided or arranged for *pursuant* to an individual service plan for services provided on an individual basis. Furthermore, this must be documented, and there must be a means of determining that the services provided were prescribed by the service plan.

In applying these criteria to claims for Federal Financial participation it should be remembered that Federal Financial Participation may not be allowed until after the appropriate plan provision is approved as a part of the State Plan and then may be allowed only from the beginning of the calendar quarter in which approvable plan material was submitted or the date the plan provision was placed in operation on a statewide basis, whichever is later.

In the case of purchase of service, the purchase arrangement must have been placed in effect under a purchase of service agreement or other cooperative arrangement. This would usually mean that a written agreement between the single State agency and the provider had been executed. In the absence of a written agreement, there must be an adequate showing of an oral agreement which was valid under State law.

Issue #5

May any expenditures be claimed on a retroactive basis that have not been made

under conditions which meet the criteria for the plan being in operation, i.e.,

1. Is retroactive determination of eligibility allowable?

2. May individual service plans be constructed after the fact?

3. May arrangements for services pursuant to individual service plans be after the fact?

4. May accounting methods be constructed after the fact?

Response

1. No, but provision of service may be initiated prior to completion of the eligibility determination process in cases of emergency. In such cases, expenditures for services to ineligibles should not be claimed.

2. No

3. No

4. No, but correction of errors and revision of reported expenditures to reflect proper allocation of costs may result in adjustment of claims for prior periods.

Issue #6

Rates of Payment - 45 CFR 226.1(a)(7) provides that the State plan must provide for the establishment of rates of payment which "do not exceed the amounts reasonable and

necessary to assure quality of services, and in the case of services purchased from other public agencies are in accordance with the costs reasonably assignable to such services." How are these determinations to be made; when are they to be made and what documentation is necessary? Is sampling satisfactory in establishing these costs? If so, what are the parameters of the sampling?

Response

Rates of Payments - We assume general guidelines exist on quality of service such as qualified staff, reasonable caseloads, good supervision and management, etc. Some tests of the State agency activity to determine whether they were establishing reasonable rates of payment would be:

1. Purchase from private sector

a. Rates paid for eligibles should be no more than rate charged for ineligibles for comparable service;

b. Rates per work unit or costing methods should be negotiated based on a private agency budget and on equitable allocation of budgeted costs to eligibles together with an appropriate work unit if used; also compare rate with other private agencies;

c. A work unit is appropriate when the cost of providing that work unit does not vary significantly in most instances;

d. When unit cost or rates are used and billed based on budgeted costs, adjustments to actual should be made every six months;

e. Scientific sampling is a satisfactory method of determining costs of service, assuming the sample design will produce results with a confidence level of 95% plus or minus 1%;

f. A-87 principles for allocation of indirect costs to activities can be followed but the "allowability of costs" portion does not have to be met.

2. Purchases from public sector

The tests specified above for the private sector also apply to the public sector except that the public agency must fully comply with OMB Circular A-87.

Issue #7

45 CFR 226.1(a)(2) provides that the single State agency will retain continuing basic responsibility for determination as to the eligibility of individuals for services. The June 17, 1971, memorandum (page 6) provides that some of the functions of determining eligibility and developing individual service plans can be performed by the public agency providing the service. What documentation is required to establish that these functions have been performed adequately? Is sampling permissible? What are the parameters of the sampling?

Response

The single State agency retains responsibility for eligibility determination and development of individual service plans. This means that while the agency may delegate some functions of obtaining information and making decisions necessary for eligibility determination, it may not delegate the function of making the determination. Where a group has been determined to be eligible by the single State agency for services provided on a group basis the act of determining that persons receiving services are members of the group may be performed by the provider subject to monitoring by the single State agency. This monitoring function may be accomplished by sampling the effectiveness of the method of establishing membership in the group. If the method is found to be ineffective, corrective action must be taken.

Where eligibility is determined on an individual basis the single State agency must make that determination prior to or concurrent with the provision of service except in cases of emergency. In cases of emergency the single State agency must make the determination within thirty days of the date provision of service was initiated and must eliminate from claims for Federal Financial Participation all expenditures for services to persons determined to be ineligible. Where the determination is made on the basis of information furnished by the provider or the recipient, the single state agency must verify the information or

establish a system of quality control to insure that the incidence of incorrect determinations is not excessive. The single State agency may accept the decisions of the provider agency concerning elements of eligibility for which the provider agency has special professional competence and has examined evidence in accordance with criteria provided by the single State agency (e.g. determination of disability on the basis of medical evidence using established disability criteria).

The single State agency may delegate the entire function of development and maintenance of service plans only in those cases where all services required by the family (AFDC) or individual (adult programs) are to be provided or arranged by the agency to which the entire function is delegated. In all other cases, where functions of developing individual service plans have been delegated, the single State agency must review the service plan prior to or concurrent with the provision of services except in emergencies and determine that the plan is appropriate to the needs of the family or individual. In making this determination, the single State agency may accept the judgment of professional personnel with regard to the appropriateness of individual services. Whenever elements of the service plan for an individual or family are developed by more than one provider, these elements must be consolidated into a single service plan by the single State agency and reviewed and approved for appropriateness as a comprehensive plan for services to that

individual or family. This review must be conducted on a current basis.

The single State agency must monitor the accomplishment of the functions of plan development or maintenace performed by the provider to insure that all requirements of 45 CFR 220.16 and 45 CFR 222.22 are met. Sampling may be appropriate for the purpose, so long as corrective action is taken when excessive error rates are found.

/s/
John D. Twiname

EXHIBIT "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGIONAL OFFICE
1114 COMMERCE STREET
DALLAS, TEXAS 75202

Social and Rehabilitation
Service
RECEIVED
JAN 23 1973
State Department of Public
Welfare
Office of Commissioner

January 19, 1973

Mr. Raymond W. Vowell, Commissioner
Texas State Department of Public Welfare
John H. Reagan Building
Austin, Texas 78701

Dear Mr. Vowell:

We have reviewed your expenditure report and supporting documentation for the quarter ending June 30, 1972, in which the State makes a claim in the amount of $92,731,245 for retroactive social service expenditures during the period July 1, 1971, through March 31, 1972.

It will be necessary to adjust the fourth quarter expenditure report for FY 1972 to delete the $92,731,245 from federal financial participation (line 13 of SRS OA 41). The reasons for this disallowance were specifically stated in the interpretations to the social service cost issues memorandum dated December 20, 1972, from the SRS Administrator. We submitted this memorandum to you on January 2, 1973. The more important reasons applicable to the disallowance are specified as follows:

(1) During the period in question (July 1, 1971, to March 31, 1972) eligibility for services was not determined at, or prior to, the time of service delivery.

(2) An individual service plan for each recipient was not developed and maintained on a current basis. Service plans were developed concurrently with eligibility determinations. In fact, a common form was used both to determine eligibility and as a service plan. Since information to complete this form was gathered through a contract with Peat, Marwick, Mitchell and Company signed July 26, 1972, there is no question that such information was developed after the fact.

(3) Since there were no current individual service plans, there were no records of services provided pursuant to such plans. Records of services provided were also developed by Peat, Marwick, Mitchell and Company as part of the cost accounting. These records were developed at the same time as recipient eligibility and individual service plans.

(4) Accounting and costing systems were constructed after the fact and were not in effect at the time the services were provided. This is evidenced by the fact that costing was not possible until after eligibility determinations were done and records of services were developed. On August 3, 1972, we met with representatives of Peat, Marwick, Mitchell and Company to discuss methodology to document the retroactive claim. A manual was developed describing the procedures and methods to be followed in accumulating the costs of services. This manual was completed on August 18, 1972. On June 9, 1972, we received a revised estimate of expenditures for the retroactive period in the amount of $95 million. This estimate was

revised considerably by the State after documentation of costs was completed which is further evidence that costing was constructed after the fact.

Thus, it will now be necessary for the State to submit a revised expenditure report for the period ending June 30, 1972, giving effect to the reduction in federal financial participation of $92,731,245.

Sincerely yours,

/s/
Clarence M. Lambright
Regional Commissioner

TEXAS DEPARTMENT OF PUBLIC WELFARE

STATE PLAN

SERVICES TO FAMILIES AND CHILDREN

Title IV-A and B,
SOCIAL SECURITY ACT

Austin, Texas *April 30, 1969*

3.2 Service Plan — Regulation 220.16

(a) A service plan will be developed and maintained on a continuing basis for each family and child who requires service in accordance with all the conditions as specified in the Regulation.

(b) The social data and services are reported by appropriate staff member to the Automatic Data Processing System. From this, notifications are sent to workers and supervisors to assure review of the plan at least annually. It is the responsibility of workers and supervisors to assess the continued suitability of service plans and to make changes, as appropriate, from on-going work with clients.

3.2
Effective 4-30-69

STATE PLAN FOR TITLE I, X, XIV OR XVI
OF THE SOCIAL SECURITY ACT
SERVICE PROGRAMS FOR AGED, BLIND, OR
DISABLED PERSONS

STATE Texas

The State Department of Public Welfare
(name of single State agency)

submits herewith the State plan provisions with respect to the service programs checked below and hereby agrees to administer the programs in accordance with the provisions of the State plan, the Act, and all related regulations and policies.

PROGRAMS COVERED

Services (50 Percent Federal Financial Participation)	Services (75 Percent Federal Financial Participation)
☐ Title I	☒ Title I
☐ Title X	☒ Title X
☐ Title XIV	☒ Title XIV
☐ Title XVI	☐ Title XVI

The Texas State Department of Public Welfare
(name of single State agency)
certifies as follows:

SECTION I MANDATORY PROVISIONS FOR ALL SERVICE PROGRAMS

Regulations

222.1 1. Services Provided, Groups Covered, and Other Provisions

(a) The State agency will make services available to all current applicants and recipients of financial assistance. Attachment 1A describes the services provided.

222.22 16. Individual Service Plans

For each individual receiving services, a service plan will be developed, implemented, reviewed, and recorded in accordance with the conditions specified in 45 CFR 222.22.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Submit 6 Copies

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO REGIONAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE	TRANSMITTAL NUMBER 71-45

I PROGRAM IDENTIFICATION (Same identification as title page of preprinted plan)
Services to Families and Children, Title IV-A and B

II TYPE OF ACTION SUBMITTED FOR APPROVAL (Check one and enter effective date)

☐ NEW STATE PLAN ☒ AMENDMENT	EFFECTIVE DATE ➡	July 1, 1971

COMPLETE REMAINDER OF PART II IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGULATION CITATION
SRS Program Regulation 220.52

NUMBER OF THE PLAN SECTION OR ATTACHMENT	NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT
6.3	6.3

SUBJECT OF AMENDMENT
6.3 - Provides optional groups to be served.

III GOVERNOR'S REVIEW (Check one)

☒ GOVERNOR'S OFFICE REPORTED NO COMMENT

☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE

SIGNATURE OF STATE AGENCY OFFICIAL R W Vowell	REPORT OF SRS APPROVAL DATE RECEIVED IN REGIONAL OFFICE: August 12, 1971 — REGION: VI
TITLE Commissioner	Plan approved - one copy attached
DATE July 30, 1971	SIGNATURE OF REGIONAL OFFICIAL Clarence Ambright
RETURN TO: (Name and Address of State Agency) State Department Of Public Welfare John H. Reagan Building Austin, Texas 78701	TITLE Regional Commissioner S[illegible] — DATE: August 17, 1971
	REMARKS

SRS - OPC - 11 (MAY, 1970)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Submit 6 Copies

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE	TRANSMITTAL NUMBER 71-43

I PROGRAM IDENTIFICATION (Same identification as title page of preprinted plan) State Plan for Title I, X, XIV or XVI of the Social Security Act Service Programs for Aged, Blind, or Disabled Persons

II TYPE OF ACTION SUBMITTED FOR APPROVAL (Check one and enter effective date)

☒ NEW STATE PLAN ☐ AMENDMENT	EFFECTIVE DATE ⇨	July 1, 1971

COMPLETE REMAINDER OF PART II IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGULATION CITATION Code of Federal Regulations, Title 45 - Public Welfare - Chapter II Social and Rehabilitation Service - Part 222, Service Programs for Aged, Blind or Disabled Persons: Titles I, X, XIV - Social Security Act

NUMBER OF THE PLAN SECTION OR ATTACHMENT	NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT

SUBJECT OF AMENDMENT

III GOVERNOR'S REVIEW (Check one)

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT

☒ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE

SIGNATURE OF STATE AGENCY OFFICIAL [signature]	REPORT OF SRS APPROVAL DATE RECEIVED IN REGIONAL OFFICE: AUG 17 1971 — REGION: VI
TITLE Commissioner	Plan approved – one copy attached
DATE July 1, 1971	SIGNATURE OF REGIONAL OFFICIAL [signature] Clarence M. Lambright
RETURN TO: (Name and Address of State Agency) Texas State Department of Public Welfare John.H. Reagan Building Austin, Texas 78701	TITLE: Regional Commissioner — DATE: 8/18/71 REMARKS: 329

SRS – OPC – 11 (MAY, 1970)